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No. 94-1984

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In the Supreme Court of the United States

OCTOBER TERM, 1995

ROSS HUEBNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the filing of a fraudulent bankruptcy petition that falsely lists expenses in excess of income can constitute an attempt to evade payment of income tax.

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 34-58), affirming in part and reversing in part petitioner's convictions, is reported at 16 F.3d 348. The amended opinion of the court of appeals (Pet. App. 3-33), affirming all of petitioner's convictions, is reported at 48 F.3d 376.

JURISDICTION

The amended judgment of the court of appeals was entered on December 16, 1994. A further petition for rehearing was denied on March 15, 1995. Pet. App.

1-2. The petition for a writ of certiorari was filed on June 6, 1995. Although the petition invokes the jurisdiction of this Court under 28 U.S.C. 1257, jurisdiction would appear to rest on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioner was convicted on one count of conspiring to attempt to evade the payment of income taxes and to defraud the United States, in violation of 18 U.S.C. 371, and 12 counts of aiding and abetting the attempted evasion of payment of income taxes, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2. He was sentenced to five years' probation and fined $5,000. The court of appeals initially reversed his convictions for aiding and abetting attempted income tax evasion and affirmed his conviction for conspiracy. Pet. App. 34-58. After the parties filed petitions for rehearing, the court of appeals withdrew its original opinion and issued a new decision, affirming all of petitioner's convictions. *Id.* at 3-33.

1. The charges against petitioner arose out of a scheme in which he, John Freeman, John Williams, and others assisted numerous persons in filing fraudulent bankruptcy petitions. Pet. App. 6-7. Freeman operated a tax protest group under the name "Freeman University" in Las Vegas, Nevada, during the years at issue. 7 Tr. 201. At his "university," Freeman gave advice to people with tax problems about dealing with the Internal Revenue Service (IRS). Pet. App. 7; 6 Tr. 149; 7 Tr. 201-202.

Freeman's clients named in the indictment had received notices of wage levies from the IRS. Freeman advised his clients that they should file for bankruptcy because that would stop collection by the IRS. Freeman also had the clients sign backdated, false promissory notes to an entity called Constitutional Sulphur. Freeman chose amounts for the fraudulent debts to Constitutional Sulphur that would appear to require substantial interest payments and would absorb most or all of the clients' available income. Pet. App. 6-7. The clients then reported the sham debt to Constitutional Sulphur on their bankruptcy petitions. *Id.* at 7-8. Petitioner aided and abetted the scheme by preparing the false promissory notes. *Id.* at 8. Williams signed the notes as a witness and filed the petitions in court. *Ibid.*

After the clients filed their fraudulent bankruptcy petitions in bankruptcy court, the IRS received notice of the filings and, pursuant to the automatic stay provision of the Bankruptcy Code (11 U.S.C. 362(a)), released the wage levies. Pet. App. 8-9. The bankruptcy court eventually dismissed the bankruptcy petitions of Freeman's clients involved in the counts on which petitioner was found guilty. See Gov't C.A. Br. 11-14.

2. In its initial decision reversing petitioner's convictions for aiding and abetting attempted income tax evasion, the court of appeals concluded that a taxpayer's filing of a single, fraudulent bankruptcy petition does not constitute attempted tax evasion, even if that filing is intended to delay the process of tax collection by forcing the release of an IRS wage levy. Pet. App. 44-45. The majority relied on lan-

guage in a prior decision in which the court had stated that tax evasion "contemplate[s] an escape from tax and not merely a postponement of disclosure or payment. . . . [The evasion] focuses on the accused's intent to deprive the Government of its tax moneys, and this requires more than just delay." *Id.* at 42 (quoting *Edwards* v. *United States*, 375 F.2d 862, 867 (9th Cir. 1967)). The majority reasoned that only delay, not permanent escape from the tax, was at issue in this case because "a petition in bankruptcy will not result in wiping out liability for the income taxes involved here. The filing causes the release of the levy, and impedes for some period of time the process of collection. It will not lead to discharge of the debt." Pet. App. 39-40.

Circuit Judge Wiggins dissented. He pointed out that "[t]he filing of fraudulent bankruptcy forms had the immediate effect of releasing wages seized by the IRS to the 'taxpayer'" and reasoned that "[s]uch a release effectively 'evaded' the prompt and just payment of the taxes seized." He also observed that "the next effort to collect taxes can be met with similar acts of evasion." Pet. App. 57-58.

3. After the parties filed petitions for rehearing, the court of appeals issued a superseding opinion in which it upheld all of petitioner's convictions. The court concluded that the filing of a single, fraudulent bankruptcy petition can constitute attempted evasion of income tax. Pet. App. 14-19. The court observed that attempted tax evasion, in violation of 26 U.S.C. 7201, "includes the offense of willfully attempting to evade or defeat the *assessment* of a tax as well as the offense of willfully attempting to [evade or] defeat the

payment of a tax." Pet. App. 9-10 (quoting *Sansone* v. *United States*, 380 U.S. 343, 354 (1965)) (emphasis in court of appeals' opinion).

The court again acknowledged that the taxpayers' filing of the fraudulent bankruptcy petitions involved in this case did not affect their tax liability, and it also noted that, in some circumstances, the filing of a bankruptcy petition to obtain the lifting of a wage levy may be permissible. Nevertheless, it concluded that, in this case, the false assertions regarding the phony Constitutional Sulphur note "added something to the purpose of the attempt, substantial enough to make it criminal." Pet. App. 14. The court observed that "[t]he false assertions of heavy debt and financial distress must have been made with a purpose" and that "the purpose of the assertions must have been thought important" by petitioner, Freeman, and the filers of the false bankruptcy petitions, since "[t]he taxpayers not only lied about the facts, but they and Freeman and [petitioner] went to some trouble to fabricate documentary support." *Id.* at 14-15.

The court distinguished its prior decision in *Edwards* on the ground that, in that case, "there was insufficient evidence of any willfulness on the part of the tax preparer permanently to evade payment." Pet. App. 17-18. In this case, by contrast, the court concluded that "the evidence is strong that these taxpayers do not intend voluntarily to pay their tax obligations," and that the taxpayers "obstructed the IRS collection [efforts] with the purpose of permanently depriving the IRS of the money which it would have collected if it had not been forced to release its levy." *Id.* at 18.

ARGUMENT

Petitioner renews his contention that the filing of a fraudulent bankruptcy petition for the purpose of obtaining an automatic stay of an IRS levy cannot constitute an attempt to evade payment of tax. The court of appeals' decision to the contrary is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioner's principal contention (Pet. 16-23) is that the filing of a fraudulent bankruptcy petition that falsely lists expenses in excess of income cannot constitute the attempted evasion of the payment of income tax, even if that filing was made with the purpose of obtaining release from an IRS wage levy. He argues that the release from the levy pursuant to the automatic stay in bankruptcy is the result of the filing of the bankruptcy petition, rather than the false contents of the petition. He also notes (Pet. 23) that one need not have expenses in excess of income to file a bankruptcy petition.

It is well settled that any affirmative conduct, "the likely effect of which would be to mislead or conceal," can constitute an attempt to evade a tax or the payment of a tax, "[i]f the tax-evasion motive plays any part in such conduct." *Spies* v. *United States*, 317 U.S. 492, 499 (1943). "An affirmative willful act which in any manner serves the purpose of evasion is all that is required." *Edwards* v. *United States*, 375 F.2d 862, 866 (9th Cir. 1967). Moreover, attempted tax evasion includes the evasion of payment of tax as well as evasion of tax liability. *United States* v. *McGill*,

964 F.2d 222, 230-231 (3d Cir.), cert. denied, 113 S. Ct. 664 (1992). Evasion of payment of income tax encompasses affirmative, misleading conduct designed to place assets beyond the government's reach after a tax liability has been assessed. *Ibid.*; see *Spies*, 317 U.S. at 499 (tax evasion includes placing deposits into accounts in another's name); *United States* v. *Conley*, 826 F.2d 551, 557 (7th Cir. 1987) (same); *Cohen* v. *United States*, 297 F.2d 760, 762 (9th Cir.) (same), cert. denied, 369 U.S. 865 (1962).

The court of appeals correctly observed that, in this case, the false assertions in the bankruptcy petitions of debts owed to Constitutional Sulphur and expenses exceeding income had the capacity to mislead the IRS and to prevent the collection of the entire tax due, beyond the temporary stay of the wage levies that automatically followed from the filing of the petitions. "There was testimony that the IRS may settle a claim in return for a promise of installment payments, based on ability to pay, and may suspend collection where hardship is shown. [If t]he facts falsely claimed [were true, they] might affect the IRS' willingness to suspend collection or settle its claim." Pet. App. 24. Furthermore, the false assertion of a large debt "created a deceitful appearance of financial hardship and a readily understandable reason for seeking the protection of bankruptcy." *Id.* at 23. The false assertions also rendered it less likely that the IRS would move for dismissal of the bankruptcy petitions for abuse, or that the court would dismiss the petitions on that ground. The assertions thereby made it more likely that the IRS would settle with the filers. See *id.* at 23-24. Thus, the court of appeals

correctly concluded that the filing of a fraudulent bankruptcy petition that falsely lists expenses exceeding income can affect the IRS's collection of tax due and can constitute an attempt to evade the payment of tax, if the defendants have a tax evasion motive.

The evidence overwhelmingly demonstrated that petitioner and the filers had a tax evasion motive and intended that the filers permanently escape the payment of at least most of their taxes. For example, the evidence established that Freeman's clients had failed to file income tax returns and had filed false withholding certificates (Forms W-4) to prevent withholding from their wages. See, *e.g.*, 2 Tr. 40, 66; 3 Tr. 192-199, 264; 8 Tr. 103-104, 134-135, 149-150. Williams told an undercover agent that, if he filed for bankruptcy, he could offer the IRS "ten cents on the dollar." 5 Tr. 56. Williams also told that agent that he "routinely" filed for bankruptcy "for protection" from the IRS. *Ibid.* Freeman chose the amount of the phony debts to create the appearance that the clients had no money available to pay the IRS. 5 Tr. 82. The clients were also told that, if they filed for bankruptcy under Chapter 11 of the Bankruptcy Code, no trustee would be involved, and that, since Constitutional Sulphur (in reality Freeman) would be listed as the major creditor, Freeman would be on the creditors' committee. 5 Tr. 67.

As the court of appeals pointed out, although the clients might not have been successful in eliminating their entire tax liability merely by filing the fraudulent bankruptcy petitions, "it is the 'willful and positive attempt to evade tax in any manner or to

defeat it by any means' which constitutes the offense, rather than the success or consummation of the scheme." Pet. App. 15-16 (quoting *Spies*, 317 U.S. at 499). In this case, the evidence demonstrated that petitioner, Freeman, and their confederates embarked on a course of conduct in bankruptcy court that could have effectively eliminated much of the filers' tax liability. The tax avoidance plan included the filing of the petition to obtain the automatic stay, the submission of the false Constitutional Sulphur note to mislead the IRS into believing that the filers had insufficient income to pay their taxes, and the abuse of the creditors' committee to effect a fraudulent compromise of the filers' tax liability. Petitioner's assistance in this scheme, even if it was not ultimately successful, aided and abetted the filers' attempts to evade payment of their taxes.

2. Petitioner also contends (Pet. 23-24) that an effort to delay or to postpone the payment of income taxes, even if undertaken with fraudulent intent, cannot be attempted tax evasion under 26 U.S.C. 7201. As noted above, however, there was evidence that petitioner, Williams, Freeman, and Freeman's clients intended that the filers escape payment of all or most of their taxes permanently. Their efforts at escaping the tax went beyond seeking the temporary respite afforded by the bankruptcy stay.

In any event, the prohibited attempt at tax evasion need not permanently prevent tax collection or be intended to achieve that result. In *Sansone*, the Court held that "[n]o defense to a § 7201 evasion charge is made out by showing that the defendant willfully and fraudulently understated his tax liabil-

ity for the year involved but intended to report the income and pay the tax at some later time." 380 U.S. at 354.* The Court also noted that Section 7201 was "the capstone of a system of sanctions which singly or in combination were calculated to induce *prompt* and forthright fulfillment of *every* duty under the income tax law." *Sansone*, 380 U.S. at 350 (emphasis added). The effectiveness of Section 7201 in inducing prompt compliance with the duty to pay tax would be seriously impaired if the willful attempt to delay the collection of tax by fraudulent means were held not to be tax evasion.

Petitioner's reliance (Pet. 24) on *Edwards* v. *United States*, 375 F.2d 862 (9th Cir. 1967), to support his argument that an affirmative act of evasion must do more than delay the payment of a tax is misplaced. *Edwards* can be read as holding that a prosecution under 26 U.S.C. 7201 requires proof of an intent permanently to evade the assessment or collection of a tax, "not merely a postponement of disclosure or payment." 375 F.2d at 867. The *Edwards* court cited no authority for that proposition, however, and we are not aware of any other federal appellate decision that has endorsed that view. And, to the extent that the decision below may be inconsistent with the same

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* Although the defendant in *Sansone* was charged with attempting to evade the assessment of a tax, the analysis in *Sansone* also applies to the charges of attempted evasion of payment of tax involved here. Section 7201 defines a single crime of tax evasion, and evasion of assessment and evasion of payment are two different methods of committing the crime. See *United States* v. *Mal*, 942 F.2d 682, 688 (9th Cir. 1991); *United States* v. *McGill*, 964 F.2d at 231.

court's decision in *Edwards*, that intra-circuit conflict is a matter for the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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